Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

MOHAMMAD S. KHAN, Plaintiff
Petitioner

v.

ACCURATE MOLD, INC.,
Defendant/Third Party Plaintiff;
T&L PERSONNEL SERVICES, INC. and
TANH V. LAM TEMPORARY SERVICE
individually, jointly, severally, and in the alternative,
Third-Party Defendants
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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5 Sep

QUESTIONS PRESENTED FOR REVIEW

1. Does not this case, -- which involved a determination as to whether or not Respondent was Petitioner's "employer" for purposes of the immunities provided by the Pennsylvania Workers' Compensation Act), -- call for an exercise of this Court's supervisory power, in that the Courts below departed markedly from the dictates of F.R.C.P. 56 and of the Seventh Amendment, not only by rejecting the sworn testimony of the Petitioner; not only by adopting the proffers of the moving party and by drawing inferences on behalf of the moving party; but, also, by basing their decisions on a view of reality that flowed neither from commerce nor from the Record, but from a judicially created notion of implausibility?

(Answered in the negative by the Courts below).

2. Does not this case call for an exercise of this Court's supervisory power, in that the Court of Appeals failed to rule upon Petitioner's appeal from the denial of his cross-motion for partial summary judgment, thereby ignoring the fact that Respondent had played "fast and loose" with the dignity of the Federal Court by asserting that it was the "employer" for purposes of Workers' Compensation immunity, and yet at the same time abdicating the employer's responsibility for compliance with Wage and Hour laws?

(Answered in the negative by the Courts below).

THE PARTIES TO THE PROCEEDING

Mohammad S. Khan
2410 South 7th Street
Philadelphia, PA 19148
Petitioner

Accurate Mold, Inc.
900 Chestnut Street
Somerdale, NJ 08083
Respondent

T & L Personnel Services, Inc. and
Tanh V. Lam Temporary Service
526 W. Porter Street
Philadelphia, PA 19148
Third Party Defendants

CORPORATE DISCLOSURE STATEMENT

Plaintiff is not a corporation.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDER ENTERED IN THE CASE

The Order and Opinion of the United States District Court for the Eastern District of Pennsylvania, Edmund V. Ludwig, J., entered January 18, 2000, is reported at Khan v. Accurate Mold, Inc., 82 F.Supp.2d 381 (E.D.Pa. 2000), and is set forth in the Appendix at page 1a.

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit, Alito, Roth, and Garth, Circuit Judges, entered July 31, 2001, affirming the Order of the District Court, are not reported. The Judgment and Memorandum Opinion are set forth in the Appendix at page 10a.

The Order of the United States Court of Appeals for the Third Circuit, Alito, Roth, and Garth, Circuit Judges, entered September 17, 2001, denying the Petition for Rehearing, is not reported. The Order is set forth in the Appendix at page15a.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Judgment sought to be reviewed was entered by the Court of Appeals for the Third Circuit on July 31, 2001. The Order denying the Petition for Rehearing was entered on September 17, 2001.

The statutory provision believed to confer jurisdiction on this Court to review on a writ of certiorari the Judgment of the Court of Appeals is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

F.R.C.P 56(c) and (e) provide:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

The Basis for Federal Jurisdiction In The Court of First Instance

This case was removed by Defendant-Respondent, Accurate Mold, Inc., to the District Court, from the Court of Common Pleas of Philadelphia County. Plaintiff-Petitioner, Mohammad S. Khan, is an individual and a citizen of Pennsylvania. Defendant, Accurate Mold, Inc. ("Accurate Mold"), is a New Jersey corporation with a principal place of business in New Jersey. Jurisdiction in the District Court was based on diversity of citizenship and amount in controversy, 28 U.S.C. Section 1332, and upon the removal statute, 28 U.S.C. Section 1441.

The Facts Material to Consideration of the Questions Presented

1. Procedural Background.

This case arose on June 2, 1997, when Petitioner, Mohammad S. Khan ("Khan") lost his right hand while at Accurate Mold's premises in Somerdale, New Jersey. Khan brought suit against Accurate Mold, alleging negligence. Accurate Mold added T&L Personnel Services, Inc. and Tahn V. Lam Temporary Services as third party defendants.

Following discovery, Accurate Mold moved for summary judgment on the ground that Khan was its "employee" at the time of the accident, and was therefore barred from suit by the immunity provisions of the Pennsylvania Workers' Compensation Act, 77 P.S. Section 1 *et seq*.

Petitioner answered the motion, denying the contention, and cross-moved for partial summary judgment on the same issue, but relying upon separate grounds. (Appendix in the Court of Appeals, hereinafter referred to as "C/A Appendix", pages 52a-77a).

On January 18, 2000, the District Court granted Accurate Mold's motion, denied Petitioner's cross-motion without discussion, and dismissed the case. (Order and Memorandum of the District Court, Appendix, page 1a). [1]

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[1] Third party Defendants, T&L Personnel Services, Inc. and Tanh V. Lam Temporary Services, had also filed a Motion for Summary Judgment, which motion was parallel to Plaintiff's Cross-Motion for Summary Judgment. The District Court denied the motion of Third Party Defendants as moot. (Appendix page 1a).

On July 31, 2001, the Third Circuit affirmed, adopting Accurate Mold's position and failing to rule upon Petitioner's appeal from the denial of his cross-motion. On September 17, 2001, the Court of Appeals denied rehearing. (Judgment and Memorandum Opinion; Order Sur Petition for Rehearing; Appendix, pages 10a, 15a).

2. The Material Facts -- A Sharp Division in Testimony

A. Petitioner's Testimony: No One From Accurate Mold Did, Or Could, Supervise His Work.

Petitioner, Mohammad S. Khan, does not speak English. Two weeks and one day before the accident, he joined a group of men who worked for Mr. Tanh V. Lam, of T&L Personnel Services, Inc. Each day, Mr. Lam picked up Petitioner in front of his house in Philadelphia and drove him, with eight other Pakistani men, to the premises of Accurate Mold. (C/A Appendix, pages 215a, 220a, 227a-230a, 234a-235a; Khan Deposition, 7/21/99, pages 4, 9, 16-20, 23-24).

Petitioner regarded Mr. Lam as his employer; it was Mr. Lam who was "responsible for our work." (C/A Appendix, page 254a, 260a, 253a, 268a-269a; Khan Deposition, 8/31/99, pages 15, 21, 30-31, 14).

Nicholas Andrew Miller, Accurate Mold's General Manager, agreed:

> Q. What was your understanding as to who was Mr. Khan's employer on the day he was injured?
> A. T&L Personnel Services.

(C/A Appendix, page 163a; Miller Deposition, page 76).

Khan described the following arrangement at Accurate Mold: The Pakistanis worked together on machines. No other persons worked on these machines besides Khan and his Pakistani friends. On his first day of work, Khan was shown how to do the work by one of his Pakistani friends. (C/A Appendix, pages 233a-234a, 270a, 233a; Khan Deposition, 7/21/99, pages 22-23; Khan Deposition, 8/31/99, page 32).

> Q. Now once the nine of you or eight of you arrived at the plastic factory, did someone from the plastic factorymeet you or greet you?
> A. No. They used to do their work and we used to do our work.
>
> (C/A Appendix, page 234a; Khan Deposition, 7/21/99, page 23).

The Pakistani men worked together, rotating their jobs:

> Q. Who directed you to move to another machine?
> A. ... We -- nine of our friends, all from Pakistan, we used to rotate our jobs from time to time.
>
> (C/A Appendix, pages 234a-235a; Khan Deposition, 7/21/99, pages 23-24).

> (S)o we used to exchange and do it by rotation from time to time and we used to watch each other how to do, so everything was in full cooperation between my friends ....

(C/A Appendix, page 249a; Khan Deposition, 8/31/99, page 10).

No one from Accurate Mold gave Khan any instruction or training:

Q. Did anybody ... besides fellow Pakistanis at the factory give you any instructions on how to use a machine?
A. No.

(C/A Appendix, page 272a; Khan Deposition, 8/31/99, page 34).

No one from Accurate Mold gave him any supervision:

Q. While you were working at the plastic factory, was there a boss or supervisor who you had to answer to or who came to see what you were doing?
A. No.

(C/A Appendix, page 235a; Khan Deposition, 7/21/99, page 24).

A. Just my friends ... no one else used to come and watch or give any instructions.

(C/A Appendix, page 252a; Khan Deposition, 8/31/99, page 13).

No one ever inspected his work while he was working. The men put the work into a box, and then that box was emptied into a bigger box, and when they returned the next day, the big box would not be there. (C/A

Appendix, page 252a; Khan Deposition, 8/31/99, page 13).

No one from Accurate Mold ever entered the area where Khan and the other Pakistani men were working. (C/A Appendix, page 260a; Khan Deposition, 8/31/99, page 21). He never spoke to anyone from Accurate Mold:

> Q. Did you ever speak with anyone at the plastic factory other than your friends for the two weeks you were there before you got hurt?
> A. No.

He did not punch a clock or sign in. (C/A Appendix, pages 235a-236a; Khan Deposition, 7/21/99, pages 24-25). Khan observed people at the factory who sat in offices, "but I had no relationship with them and did not know them." (C/A Appendix, pages 248a, 258a; Khan Deposition, 8/31/99, pages 9, 19). Khan once saw a gentlemen walk through the factory who was said to be the owner.

> Q. The person that you did see walk through the factory, was it your understanding that if he had told you to do something at the plant, that you would have had to have followed his direction?
> A. **No. I did not know who he was and I knew that I was not hired by him or employed by him. I was working for my own contractor, and my friends and I were busy doing the work that we were asked to do, so I had no understanding that someone else will come and stop by and ask us to do certain thing and we have to, no, that is not correct.**

(C/A Appendix, pages 260a-261a; Khan Deposition, 8/31/99, pages 21-22; emphasis supplied).

Q. Other than your Pakistani friends who worked with you, was there anyone else that it was your understanding you had to listen to at the factory while you were working?
A. No.

(C/A Appendix, page 261a; Khan Deposition, 8/31/99, page 22).

He was paid $5.00/hour for a 12 hour shift, by Mr. Lam. (C/A Appendix, pages 230a-231a; Khan Deposition, 7/21/99, pages 19-20).

B. Accurate Mold's Contradictory and Corroborative Deposition Testimony and Affidavit.

With barely a nod to the deposition testimony of Petitioner, Accurate Mold based its Motion for Summary Judgment, (C/A Appendix, pages 23a-43a), on the deposition testimony of interested parties: Nicholas Andrew Miller, the General Manager, and Mr. Lam; Accurate Mold also relied upon the Affidavit of Ronald Hoguet. (C/A Appendix, pages 44a-51a).

The interested nature of the testimony of Mr. Miller (General Manager) and of Mr. Hoguet (Molding Operations Manager) was evident. Mr. Lam was also an interested party: Accurate Mold was his sole client; his girl friend, with whom he lived, operated his business at the time of his deposition. (C/A Appendix, pages 292a-293a, 296a-297a, 300a, 307a, 284a, 288a; Lam Deposition, pages

19-20, 23-24, 27, 34, 11, 65).

Mr. Miller was Accurate Mold's "corporate designee" for the purpose of the depositions. (C/A Appendix, page 109a; Miller Deposition, page 22). He testified, in contradiction to Petitioner, that Accurate Mold Shift Supervisors would and could assign work to the Pakistani men, and would and could supervise the work. He also testified that Accurate Mold, (acting through Mr. Lam), could discharge an unsatisfactory worker.

There was much in Mr. Miller's testimony, -- beyond his contradictions of Khan's testimony, -- that pointed away, rather than toward, the grant of summary judgment, and that could have bolstered the confidence, in the District Court, that Mr. Khan's testimony regarding the autonomy of the men and their separation from Accurate Mold employees was the more accurate depiction of the arrangement at Accurate Mold. Indeed, Mr. Miller elsewhere confirmed that the Pakistanis regulated their own work:

> Q. Now, you were here when Mr. Khan testified that Nader or one of the others, one of the Pakistanis, gave him the job and told him to drill a hole or something. Do you have any reason to believe that that's not what occurred when he arrived on his first day,
> A. No, I wouldn't say -- I wouldn't say he was lying.
> Q. ... They would agree amongst themselves who was going to do what at a particular time based on whether they were tired or whether they -- whatever those circumstances were; is that correct, too?
> A. Yes.

(C/A Appendix, page 126a; Miller Deposition, page 39).

As previously set forth herein, Mr. Miller testified that Mr. Lam was Petitioner's employer. (C/A Appendix, page 163a; Miller Deposition, p. 76). Mr. Miller authenticated an Indemnity Agreement, entered between Accurate Mold and Mr. Lam, which provided, inter alia, that Mr. Lam **"assumes all legal responsibility as the employer of such persons."** (C/A Appendix, pages 69a-70a; 158a; Miller Deposition, page 71).

Mr. Miller testified that Accurate Mold kept a "core base" of "American workers," who were kept separate from, and treated differently from, the Pakistanis. The "core" were paid from $6.50 to $20.00/hour; they were paid overtime wages; Accurate Mold carried Workers Compensation insurance for these employees; and kept normal business records for these employees. (C/A Appendix, pages 150a, 178a-179a, 192a, 138a, 201a-202a: Miller Deposition, pages 63, 91-92, 105, 51, 114-115). There are no such records for the Pakistanis. Accurate Mold did not carry Workers Compensation insurance for the Pakistanis; Mr. Lam did this.

Mr. Miller also testified that he never discussed with Mr. Lam if he, Mr. Lam, was paying overtime wages to the Pakistani men; whether or not Mr. Lam was in compliance with wage and hour laws "was totally his [Mr. Lam's] responsibility." (C/A Appendix, pages 119a, 142a, 117a-118a; Miller Deposition, pages 55, 30-32). Mr. Lam's workers were paid by Mr. Lam. Mr. Miller said: "We knew what to pay Mr. Lam by the time card that he kept for his employees." Accurate Mold paid Mr. Lam a lump sum calculated per hour per man at $7.50 per hour. None of the names of the Pakistani men appeared on this

time card. (C/A Appendix, pages 107a, 117a-118a, 142a, 151a-152a; Miller Deposition, pages 20, 30-31, 55, 64-65).

Mr. Miller agreed that Mr. Lam had discretion to select the individuals who he brought to Accurate Mold. Decisions or complaints about pay or length of hours were directed to Mr. Lam. (C/A Appendix, pages 108a, 137a, 150a-151a; Miller Deposition, pp. 21, 50, 63-64). No one at Accurate Mold spoke Pakistani. (C/A Appendix, pages 115a, 125a; Miller Deposition, pp. 28, 38).

No one at Accurate Mold came forward, on this Record, to say that he or she had ever seen Petitioner, or known of his presence:

> Q. Were there ever any conversations with anybody at Accurate Mold about Mr. Khan before he had lost his hand?
>
> A. No, not that I'm aware of.
>
> (C/A Appendix, pages 121a-122a: Miller Deposition, pages 34-35).

> **Q. Until Mr. Khan's accident, did you even know that Mr. Khan was there? ...**
>
> **A. No.**
>
> (C/A Appendix, page 125a; Miller Deposition, page 38).

Mr. Lam's deposition testimony was cited by Accurate Mold as additional support for the motion, and in order to show that Mr. Lam had no hands-on supervision over the men after he dropped them off at the factory. However, Mr. Lam also testified that, when he dropped the men off at Accurate Mold, he left the men in the charge of Andres, one of the Pakistanis.

Q. Did Andres always work every day?

A. Yes, he's looking after them over there.

(C/A Appendix, page 356a; Lam Deposition, p. 83).

Prior to the accident, the men, with the aid of Andres and Mr. Lam, changed the hours of the shifts at Accurate Mold from three eight-hour shifts to two twelve-hour shifts, in order to make more money by compiling longer hours in a given day. (C/A Appendix, pages 336a, 344a-346a, 357a; Lam Deposition, pages 63, 71-74, 84; see also C/A Appendix, page 175a; Miller Deposition, page 88).

The Affidavit of Ronald Hoguet, Accurate Mold's Molding Operations Manager, (C/A Appendix, pages 44a-51a), was drafted, obviously, by an attorney, as a step-by-step guide to non-liability. The Affidavit insists, in contradiction to Petitioner's testimony, that Accurate Mold Shift Supervisors trained all of the Pakistani men and supervised the Pakistani men; that a Shift Supervisor was always present; that the work was inspected routinely; that Mr. Lam could be requested not to use a certain worker; and that Accurate Mold "had the right" to change the men's tasks. Mr. Hoguet conceded that a new worker might "on occasion" be trained by another member of the group. (C/A Appendix, page 47a).

In the Affidavit, there is not one word about Mohammad Khan.

THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Third Circuit sanctioned a departure so far from the lawful application of F.R.C.P. 56, and from the dictates of the Seventh Amendment, as to call for an exercise of this Court's supervisory power. The Courts below rejected the sworn testimony of the Petitioner; adopted the proffers of the moving party; drew inferences on behalf of the moving party; and came to their decisions *via* a judicially created notion of implausibility that rejected the non-moving party's testimony regarding the actual arrangements at Accurate Mold.

1. The Courts Below, Refusing to Believe That Petitioner Had Described A Wholly Plausible Arrangement in Commerce, Made Factual Determinations Based on the Proffers of the MOVING Party.

This summary judgment proceeding clearly involved a factual dispute. One the one hand, Accurate Mold depicted a "factory setting" that was marked by the usual prerogatives of the factory boss or supervisor or "employer". On the other hand, Petitioner, in sworn testimony, depicted an environment populated by an **autonomous** crew of men who were hired by their own contractor, Mr. Lam, and who were "looked after" by Andres, one of their own. Petitioner's testimony described an arrangement where he and his co-workers went about their business with virtually no contact with, and expecting no supervision from, the owners of the premises. If Petitioner's testimony is believed, then the owners at Accurate Mold, who, unarguably, wanted their plastic parts

fabricated, had been content to cede space, as well as decision-making, to another group of men who did not need, and did not want, an overseer. It is a fair inference -- and inferences are drawn at this juncture on behalf of the non-moving party, -- that everyone was not only happy with, but insisted on, the *laissez faire* arrangement until, after Khan was injured, it became tactically advantageous for Accurate Mold to deny the real workings of the place.

All of the parties, and the District Court, had no doubt that the factual issue arose in the context of an established Pennsylvania jurisprudence on the point: The central question as to whether or not Accurate Mold was Petitioner's "employer" for the purposes of immunity from suit under the Pennsylvania Workers' Compensation Act must turn on whether Accurate Mold had "the right to control the manner of the performance of the employee's work." Accountemps v. WCAB (Myers), 120 Pa. Cmwlth. 489, 548 A.2d 703 (1988), citing Mature v. Angelo, 373 Pa. 593, 97 A.2d 59 (1953).[2]

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[2] The parties and the District Court agreed that Pennsylvania law applied to the issues raised in the motions. Although the accident occurred in New Jersey, workers' compensation benefits were paid under the aegis of Pennsylvania law. (C/A Appendix, page 71a; Supplemental Agreement for Compensation). In analogous situations, i.e., in situations involving subrogation in the context of workers' compensation, Pennsylvania and Federal Courts, applying Pennsylvania conflicts law, have consistently held that the law of the state in which the compensation was paid must be looked to, to determine the rights of the parties. Allstate Ins. Co. v. McFadden, 407 Pa. Super. 1277, 1279, 595 A.2d 1277 (1991), alloc. den., 602 A.2d 855 (1992); Getek v.Ohio Cas. Ins. Co., 868 F. Supp. 751, 755 (E.D. Pa. 1994); Van Den Heuval v. Wallace, 392 Pa. Super. 242, 245, 555 A.2d 162 (1989).

There is nothing in Pennsylvania jurisprudence that permits "right to control" to be drawn from an assumption or from thin air. Rather, the contention must be grounded in evidence. Mature v. Angelo, id. at 61 (italics by the Court). "The determining factor is the actual conduct of the parties." Red Line Exp. Co. v. WCAB (Price), 138 Pa. Cmwlth. 375, 588 A.2d 90, 94 (1991), app. den., 529 Pa. 564, 602 A.2d 863 (1991).

Pennsylvania jurisprudence is abundantly clear that **whether or not a man is, (or can be), trained or supervised by another** are the most important considerations in deciding whether one is "controlled in the manner of the performance of one's work." Callender v. Goodyear Tire and Rubber, 387 Pa. Super. 283, 564 A.2d 180, 184 (1989), app. den., 560 Pa. 593, 557 A.2d 560; JFC Temps v. WCAB (Lindsay), 680 A.2d 862, 865 (1996). The Courts below had no doubt of the determinative nature of these considerations. (Order and Memorandum of the District Court, Appendix page 4a-6a; Judgment and Memorandum Opinion of the Court of Appeals, Appendix page 13a). It is clear that the fact that the accident occurred on premises that were controlled by the person claiming the immunity, and the fact that the injured person was doing work for the benefit of that person, are insufficient to determine that the injured person was, therefore, an "employee." See Accountemps v. WCAB (Myers), 120 Pa. Cmwlth. 489, 548 A.2d 703 (1988).

Accurate Mold surely had no doubt about the importance of training and supervision to its chances on the motion. Accurate Mold submitted 10 pages of allegations, as well as an Affidavit, attempting to show that it did, in fact, supervise and train the Pakistani men. (C/A Appendix, pages 28a-33a, 34a-38a, 44a-51a).

However, the District Court was content to approximate the testimony on this crucial point. The District Court conceded that, "Accurate Mold gave them hardly any supervision." (Memorandum Opinion, page 5). That concession was still a worrisome departure from Khan's testimony that there was no supervision, and that the Pakistanis were completely self regulating when it came to the conduct of their work. Indeed, Khan's testimony could not have been more starkly at odds with the District Court's notion of "hardly any" supervision:

> Q. While you were working at the plastic factory, was there a boss or supervisor who you had to answer to or who came to see what you were doing?
> A. No.
> Q. Did anybody ... besides fellow Pakistanis at the factory give you any instructions on how to use a machine.
> A. No.
>
> (C/A Appendix, page 272a; Khan Deposition, 8/31/99, page 34).

The testimony offered by Petitioner in opposition to this motion for summary judgment did not rest upon a "mere scintilla" of evidence nor upon simple denials. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); F.R.C.P. 56(e). Rather, the sworn testimony regarding the autonomy of the men was supported by substantial corroborating evidence, gathered from the proffers of Accurate Mold: There was no record at Accurate Mold of Petitioner nor of any of the Pakistani men; no one could remember even seeing Petitioner or noting his presence; the owners of Accurate Mold, before they saw the advantage, in this case, of

asserting that they were "employers", did everything in their power, in the Indemnity Agreement with Mr. Lam, to make certain that the men were to be regarded as employees of Mr. Lam. (C/A Appendix, page 69a).

The District Court, again approximating the testimony, held that, "For the most part, temporary employees worked on their own and had limited contact with Accurate Mold Employees." (Appendix page 5a). There is nothing in Khan's testimony that supports the conclusion that the arrangement pertained "for the most part." Petitioner testified that such always pertained. Indeed, the District Court later noted that, "Khan stated that he had no contact with any employees of Accurate Mold." (Appendix page 8a, n.6, emphasis supplied), but failed to give the testimony purport.

The District Court also held that: "Pakistani workers had almost no day-to-day contact with Accurate Mold employees, relying on past routine to do their jobs. 7/21 Kahn Deposition at 23-24." (District Court Memorandum Opinion, Appendix page 5a). Petitioner's testimony was that there was no day-to-day contact.

Finally, the District Court, casting out all consideration of Khan's contradictory testimony, held: "Despite its lack of hands-on supervision, Accurate Mold at all times determined what work was to be done and had the right to exercise control over how it was accomplished." (Memorandum Opinion, page 6). The District Court's conclusion can only be understood in the light of the recitals of Accurate Mold's witnesses.

Khan had testified to an environment where the men had forged the right to control their own day. If Kahn be believed, then Accurate Mold's claim of "employer" status was the child of convenience. Nevertheless, the District Court, in a startling mis-statement of the Record, said:

> Here, it is **unquestioned** that Accurate Mold could have trained, supervised, and controlled the physical manner of the work if it had found it to be necessary and desirable to do so.
>
> (District Court Memorandum Opinion, Appendix page 6a, emphasis supplied).

There is absolutely no support for this holding in Khan's testimony, which is directly to the contrary. The District Court's conclusion was, most assuredly, not "unquestioned." The District Court's conclusion can only be understood as a refusal to believe Mr. Khan. Although the Courts below never came out and said that they disbelieved Khan or found his testimony implausible, their decisions can only be understood as a barely veiled expression of incredulity that minimum wage earners could have forged the autonomy that Khan depicted. Their decisions are based on the assumption that a notion of implausibility played a proper role in this motion for summary judgment, and that such was reason enough to deprive the litigant of his right to a jury trial. It is submitted that when Courts say that facts are "unquestioned", in a situation when these "facts" are surely questioned, the Courts must be discovering their certainty from somewhere outside the Record. In this case, the certainty of the Courts below must have issued from a rock-hard belief about the ultimate, (unproven) prerogatives in the climate of all working-places. There is no other way to explain their conclusion that their holding was "unquestioned".

This case, it is submitted, calls for the supervisory attention of this Court. This Court has held that judicially constructed notions of "implausibility" have virtually no place in summary judgment decisions, restricting such notions to the examination of whether a non-moving party's inferences are reasonable. See Kodak v. Image Technical Services, 504 US. 451, 468, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), discussing Matushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In this case, the unspoken assumption of implausibility is an odd assumption, since a jury, perhaps more alert than the District Court to the nuances in the arrangements between men in commerce, might have no trouble believing that the owners of Accurate Mold and the Pakistani men had, long before Khan's arrival, come to an understanding that the men did good work, and that they were to arrive at the premises and use the machines and create the plastic parts and regulate themselves and be left alone and off by themselves.

2. The Courts Below Drew Inferences From Whole Cloth, and On Behalf of the MOVING Party.

The judicial divergences from Petitioner's testimony grew in importance and took on steam when the District Court began to draw inferences. The District Court, refusing to accept the singularity of the situation at Accurate Mold, and, despite established law, drew inferences in favor of, rather than against, the motion. "On summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion."

U.S. v. Diebold, Inc., 369 US 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176, 177 (1962).

With respect to the absence of training and supervision of the Pakistani men, (or, in the eyes of the District Court, the paucity thereof), the District Court, fully aware of the importance of these factors under Pennsylvania law, made itself an expert in manufacturing processes and thus explained away the facts: "Given that these were uncomplicated physical tasks and matters of rote, the workers required only incidental supervision or instruction." (District Court Memorandum Opinion, Appendix page 6a). The inference is simply untrue; there are work places where "uncomplicated physical tasks" are the subject of overweening scrutiny. The District Court refused to consider that the reason that such supervision did not obtain at Accurate Mold was because the Pakistani men had not agreed to submit to such supervision.

The District Court, clearly referencing the Affidavit of Mr. Hoguet, went on to hold:

> **There is no reason to believe** Accurate Mold could not have told Plaintiff, albeit through an interpreter, exactly how it wanted him to perform each part of his job.
>
> (District Court Memorandum Opinion, Appendix page 6a, emphasis supplied).

There was **every reason** to believe that the Pakistani men might have bridled at such interference in their work. There was **every reason** to believe that it was only when the attorneys for Accurate Mold saw the advantage in this litigation of casting the owners as "trainers" and "supervisors" that the Affidavit of Mr. Hoguet wove itself into cloth. In order to consider that

there was a "reason not to believe" that Accurate Mold held such sway, it was first necessary to believe Petitioner. The District Court chose not to do this, despite the fact that this Court has been unequivocal: "The evidence of a non movant is to be believed." Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 255.

Ironically, the Affidavit of Mr. Hoguet, -- the source of the District Court's inferences, -- was far less believable on its face than the testimony of Mr. Khan. After all, it was Mr. Hoguet who, attempting to explain away the fact that men spoke no English, recited that the "Shift Supervisors" used sign language! ("Simple visual demonstration without verbal instruction"). (C/A Appendix, page 47a).

The District Court adopted Mr. Hoguet's un-cross-examined recitals, despite the fact that F.R.C.P. 56 "by no means authorizes trial on affidavits," Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 255, and despite this Court's even greater distrust of the affidavits of interested witnesses. Poller v. Columbia Broadcasting System, 386 U.S. 464, 472-73, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

The District Court not only ignored Petitioner's side of the matter, and not only adopted Accurate Mold's proffers, but also used "logic" to draw additional inferences **against** Khan:

> The lack of training and monitoring does not lead to the inference that Accurate Mold did not have the right to control job performance. The non-use of power should not logically be equated with the absence of authority to exercise the power. (District Court Memorandum Opinion, Appendix page 6a).

On a motion for summary judgment, in the light most favorable to Petitioner, the "non-use" of power

should be "logically equated with" the inference that the power does not exist. It is astonishing that this absent fact should be turned on its head and used to bolster the moving party's position. Such "logic" can only be understood when one concludes that the District Court simply could not let itself adopt a view of commerce that ran against its own notions of plausibility, no matter the facts nor the direction in which the inferences actually ran. [3]

3. The Court of Appeals Adopted the Opinion of the District Court.

Upon appeal, the Court of Appeals adopted the Opinion of the District Court. (Court of Appeals Memorandum Opinion, Appendix page 13a). The Court of Appeals also wrote:

> The sole issue is whether, under Pennsylvania law, the evidence in the summary judgment record is sufficient to allow a reasonable jury to conclude that Accurate Mold was not Khan's employer. (Memorandum Opinion, Appendix page 12a).

---

[3] Accurate Mold insisted that there was quality control, and that its employees inspected the Pakistani's product. (C/A Appendix, pages 33a-34a). Hopefully, they did. However, Pennsylvania law provides that "control of the result only and not the means of accomplishment" does not make one an employer. J. Miller Co. v. Mixter, 2 Pa. Cmwlth. 229, 277 A.2d 867, 871 (1971).

The Court of Appeals ignored all of Petitioner's testimony, which could well have persuaded a reasonable jury, when deliberating the factual issues that determine whether one is an "employee" under Pennsylvania law. The Court of Appeals relied upon a partial quotation from 3 Larson's Workers' Compensation Law, Section 61.10 (2000); the full quote is:

> "It will often be found that the employer, in any showdown, would have the ultimate right to dictate the method of work if there were any occasion to do so." (Memorandum Opinion, page 2).

The operative word is "found." A "right to control" must be based on a finding. In the instant case, there is no finding of a "right to control". (Indeed, a "finding" is the jury's job). In this case, the only indication in the evidence as to the outcome of any possible "showdown" is that the Pakistanis controlled the situation when it came to a change of shifts.[4]

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[4] The Court of Appeals also relied on English v. Lehigh County Auth., 428 A.2d 1343, 1346, 1349-50 (Pa. Super. 1981), which presented none of the factual disparities of the instant case, and which described a situation much different from that described in Petitioner's testimony. There, the issue was whether the County had the right to dictate the manner of the work of part-time employees, who were taking samples of sewage. The Court outlined the facts: the County directed the workers to the site; assigned the work; directed them to go into the pit every half hour; instructed the workers's how to perform the work; and could have ordered each man to wear a gas mask, prevented more than one worker from entering the pit at any one time, and required the workers to "phone in" after each sampling.

The Court of Appeals held that "no reasonable jury could conclude that Accurate Mold did not have the right to control Khan's work." (Memorandum Opinion, page 2). That was, considering the testimony, an astonishing holding, and it is clear that the Court of Appeals had forged its own view of "implausibility" when it came not only to the rejection of Petitioner's testimony, but also to the creation of a confidence, based on no evidence, about how men behave and interact when they choose to work in a specific setting. This case presents "differing versions of the truth," and yet the Opinions of the District Court and of the Court of Appeals show no sign of this conflict, although this Court has stated clearly that "differing versions of the truth" are supposed to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 249.

"The judge's function is not to weigh the evidence and to determine the truth of the matter but to determine whether there are genuine issues for trial." Ibid. However, the Courts below clearly weighed and evaluated the evidence, finding "logical" reasons and imagined "showdowns" and disregarding the testimony in its simplicity.

This Court has said: "One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When there are factually supported claims, it is never the goal of the Rule 56 to destroy Seventh Amendment rights. "(T)he purpose of the rule is not to cut litigants off from their right to jury trial if they really have issues to try. (Citation omitted)." Poller v. Columbia Broadcasting System, 386 U.S. 464, 468, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

4. The Courts Below Ignored Petitioner's Cross-Motion for Partial Summary Judgment.

F.R.C.P. 56(c) provides that a summary judgment shall not be granted unless "... the moving party is entitled to a judgment as a matter of law." Therefore, the Court must address an issue of law that would deprive the moving party of his relief. In the instant case, Petitioner cross-moved for summary judgment. (C/A Appendix 53a). The District Court ruled upon, but did not in any manner discuss, the cross-motion. The Court of Appeals declined to allude in any manner to the District Court's disdain of the cross-motion. In the Petition for Rehearing, Khan unavailingly reminded the panel that they had ignored the cross-motion. (Petition for Panel Rehearing, page 12).

The cross-motion raised a separate point that was nonetheless relevant to the issue of whether or not Accurate Mold was an "employer": In 1997, New Jersey law provided for minimum pay of $5.05/hour (for eight hours) and minimum overtime pay of $7.58/hour. NJSA 34:11-56a4. Petitioner argued that Accurate Mold had to have known, based on simple arithmetic, that the money that it was paying to Mr. Lam per worker ($7.50/hour), could not possibly result in lawful overtime wages to the men. Indeed, the District Court noted that the Pakistani men were paid $5.00/hour. (District Court Memorandum Opinion, Appendix page 4a.

Petitioner thought it highly relevant that, despite Accurate Mold's insistence on "employer" status, it had abdicated all responsibility for payment of lawful wages. As to wages, Accurate Mold testified that such matters were "totally his (Mr. Lam's) responsibility." (C/A Appendix, page 118a; Miller Deposition, page 31).

Petitioner's argument was two-fold: (1) The fact that Accurate Mold chose to ignore the fundamental responsibilities of an employer to pay lawful wages was, as a matter of proof, clear evidence that Accurate Mold was not an "employer" in its own eyes and in the eyes of the law. Rather, the abdication of that particular responsibility showed, reliably, that abdication of the "employer's" role was the ongoing intent of Accurate Mold. (After all, it had, amongst other things, never heard of Mohammad Khan).

(2) The law will not, as a matter of policy, reward a party with an immunity granted only to an "employer", when that party has unapologetically cast off the rudimentary responsibilities of that privileged status.

The New Jersey Legislature had made crystal clear that payment of unlawful wages was **"declared to be contrary to public policy"**, NJSA 34:11-56a3. It was just as clear that a Pennsylvania (diversity) Court would enforce the public policy of its sister state. Smith v. Firemens Ins. Co. of Newark, 404 Pa. Super. 93, 590 A.2d 24 (1991), alloc. den., 605 A.2d 334 (1991), citing Societe Nationale v. U.S. District Court, 482 U.S. 522, 543, n. 27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). It was argued that a Pennsylvania Court would refuse to enforce a claim of immunity that scoffed at New Jersey public policy directly in point.

Petitioner cited to the Courts below both Pennsylvania and federal precedents, which precedents have consistently refused, in many contexts, to permit a litigant to claim the benefits of a certain status, while brushing aside the responsibilities of that status. Kiehl v. Action Manufacturing Co., 517 Pa. 183, 535 A.2d 571 (1987); Lucey v. W.C.A.B. (Vy-Cal Plastics), 701 A.2d 637 (Pa. Cmwlth. 1997), rev'd. on other grds., 557 Pa. 271,

732 A.2d 1201 (1999). The law does not permit one "to eat his apple with his `unclean hands,'" Gaudiosi v. Mellon, 269 F.2d 873, 882 (3rd Cir. 1959), nor to "have his cake and eat it." Haas v. 653 Leasing Company, 425 F. Supp. 1305, 1316 (E.D.Pa. 1977). Once a case is finally joined, a party is forbidden from asserting two opposing positions before a Court. Ligon v. Middletown Area School Dist., 136 Pa. Cmwlth. 566, 584 A.2d 376, 380 (1990); Donaldson v. Bernstein, 104 F.3d 547 , 555-56 (3rd Cir. 1997); Wade v. Woodings-Verona Tool Workers, 469 F.Supp. 465 (W.D.Pa. 1979); Selected Risks Ins. Co. v. Kobelewski, 421 F. Supp. 431 (E.D.Pa. 1976); Buehler v. Phila. and Reading Ry. Co., 280 Pa. 124, 113 A. 672 (1921); Williams v. Baptist Church, 123 Pa. Super. 136, 186 A. 168 (1936); Kuhn v. Penna. R.R. Co., 270 Pa. 474, 113 A. 672 (1921).

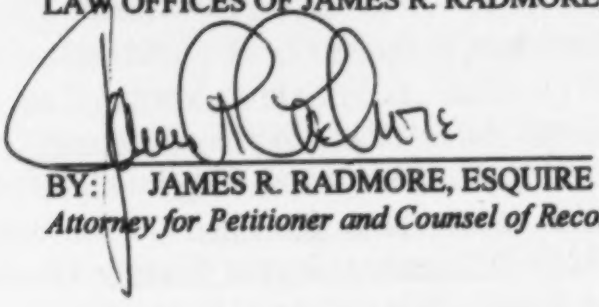
> The use of inconsistent positions would most flagrantly exemplify playing "fast and loose" with the courts, which has been emphasized as an evil the courts should not tolerate. (citation omitted). And this is more than affront to judicial dignity, for intentional self-contradiction is being used as a means of obtaining unfair advantage ....
>
> Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3rd Cir. 1953).

This vital principle in the law protects the dignity of the Court. However, this vital principle, as well as Accurate Mold's decision to be both "employer" as well as "non-employer", were given no mention by the Courts below.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
LAW OFFICES OF JAMES R. RADMORE, P.C.



BY: JAMES R. RADMORE, ESQUIRE
Attorney for Petitioner and Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOHAMMAD S. KHAN	:	CIVIL ACTION
	:	
v.	:	
	:	
ACCURATE MOLD, INC.	:	
	:	
v.	:	
	:	
T & L PERSONNEL SERVICES, INC. and TAHN V. LAM TEMPORARY SERVICES	:	NO. 99-764

ORDER

AND NOW, this 14th day of January, 2000, the following is ordered:

1. Defendant Accurate Mold Inc.'s motion for summary judgment is granted;

2. Plaintiff Mohammad S. Khan's motion for summary judgment is denied;

3. The motion of third-party defendants T & L Personnel Services, Inc. and Tahn V. Lam Temporary Services is denied as moot;

4. The action is dismissed.

s/
Edmund V. Ludwid, J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOHAMMAD S. KHAN	:	CIVIL ACTION
v.	:	
ACCURATE MOLD, INC.	:	
v.	:	
T & L PERSONNEL SERVICES, INC. and	:	
TAHN V. LAM TEMPORARY SERVICES	:	NO. 99-764

MEMORANDUM

Ludwig, J. January 14, 2000

Defendant Accurate Mold, Inc. and plaintiff Mohammad S. Khan cross-move for summary judgment; and third-party defendants T & L Personnel Services, Inc. and Than V. Lam Temporary Services move for summary judgment against Accurate Mold.[1] Fed. R. Civ. P. 56.[2] Jurisdiction is diversity. 28 U.S.C. 1332.

On June 2, 1997, Khan, an employee of T & L, a temporary employment agency, lost his right hand while operating a punch press at Accurate Mold. For a few weeks before the accident, Khan had been working at Accurate Mold under a written agreement between Accurate Mold and T & L. The agreement contained an indemnification provision covering claims and losses experienced by Accurate Mold as the result of its use of T & L's temporary employees. When Khan sued Accurate Mold for his personal injuries, the latter joined T & L as a third-party defendant indemnitor.

As summary judgment movant, defendant Accurate Mold contends that it is not subject to common law liability because Khan was a borrowed servant and, therefore, its employee. Khan maintains that he is entitled to partial summary judgment on this issue. T & L contends that its indemnity obligation to Accurate Mold does not include an employee's personal injuries. In response, Accurate Mold moves for leave to amend its third-party complaint to include a negligence claim against T & L. Fed. R. Civ. P. 15(a).

DISCUSSION

A. Liability of Accurate Mold

If Khan was Accurate Mold's employee at the time of the accident, Accurate Mold is immune from liability for his injuries by virtue of the Pennsylvania Workers' Compensation Act.[3] 77 P.S. 1 et seq. If not its employee, Accurate Mold's status is the same as any alleged tortfeasor.

Under the Pennsylvania Workers' Compensation Act, the "liability of an employer under this act shall be exclusive and in place of all other liability" to its employees. Id. at 481. In

law, the borrowed servant doctrine characterizes employees lent by one employer to another as the employee of the borrower. JFC Temps, Inc. v. Workmen's Compensation Appeal Bd., 545 Pa. 149, 680 A.2d 862 (1996). In that decision, the application of the doctrine was articulated by the Pennsylvania Supreme Court:

[t]he test for determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passed under the latter's right of control with regard not only to the work to be done but also as to the manner of performing it. The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised. Other factors include the right to select and discharge the employee and the skill or expertise required for the performance of the work. The payment of wages may be considered, but it is not a determinative factor. Although the examination of these factors guides the determination, each case much be decided on its own facts.

Id. at 545 Pa. at 153, 680 A.2d at 864 (citations omitted).

Accurate Mold is a manufacturer of plastic moldings. In May 1996, it began obtaining temporary workers from T & L[4] and paid T & L $7.50 per hour for their services. Lam dep. at 35-36. The workers, in turn, received $5 per hour from T & L.[5] Id. at 39. The work consisted of preparing plastic molds and running injection molding machines in two 12-hour shifts a day. Lam dep. at 63, 71-74. The workers were of Pakistani origin, and almost none spoke English, including plaintiff. 7/21/99 deposition of Nicholas Andrew Miller at 28.

As a daily practice, Tahn V. Lam, the sole owner of T & L, transported these temporary employees to Accurate Mold's plant in Sommerdale, New Jersey. 7/21/99 deposition of Mohammad S. Khan (7/21 Khan dep.) at 17-19. When their shift was over, he would return them to Philadelphia. Id. On occasion, Lam discussed certain employment matters with Accurate Mold's supervisors at the facility, but generally spent little time there and did not give the temporary workers any training. Lam dep. at 51-54.

For the most part, the temporary employees worked on their own and had limited contact with Accurate Mold employees.[6] 7/21 Khan dep. at 23; 8/31/99 deposition of Mohammad S. Khan (8/31 Khan dep.) at 32. Accurate Mold's supervisors communicated with the few Pakistanis who understood English[7] about the work assignments.[8] These individuals would then pass on instructions to their co-workers. Lam dep. at 83. However, these manual tasks were simple and repetitive, and the Pakistani workers had almost no day-to-day contact with Accurate Mold employees, relying on past routine to do their jobs. 7/21 Khan dep. at 23-24.[9] Plaintiff argues that since the temporary employees were treated as an autonomous, separate group within the plant, Accurate Mold should not be considered his employer. It is correct that Accurate Mold did not maintain any records or do any paperwork relative to these workers, did not keep track of their hours, and had no responsibility to pay wages or furnish insurance. Moreover, Accurate Mold gave them hardly any direct supervision.

However, the test is not whether Accurate Mold controlled the performance of the temporary employees' work; it is whether it had the right to exercise such control. "The entity

possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised." JFC Temps, 545 Pa. at 153, 680 A.2d at 864, citing Mature v. Angelo, 373 Pa. 593, 595, 97 A.2d 59, 60 (1953).

Despite its lack of hands-on supervision, Accurate Mold at all times determined what work was to be done and had the right to exercise control over how it was accomplished. Given that these were uncomplicated physical tasks and matters of rote, the workers required only incidental supervision or instruction. The lack of training and monitoring does not lead to the inference that Accurate Mold did not have the right to control job performance. The non-use of power should not logically be equated with the absence of authority to exercise the power. Here, it is unquestioned that Accurate Mold could have trained, supervised, and controlled the physical manner of the work if it had found it to be necessary and desirable to do so.[10] There is no reason to believe Accurate Mold could not have told plaintiff, albeit through an interpreter, exactly how it wanted him to perform each part of his job.

Accordingly, plaintiff, as a borrowed servant, is deemed to have been Accurate Mold's employee, for which reason, under the Pennsylvania Workers' Compensation Act, Accurate Mold is immune from liability for his injuries.

B. T & L's Liability

Having concluded that Accurate Mold is not liable, its cross-claim against third-party defendant T & L is moot, as are the latter's motions.

Edmund V. Ludwig, J.

1. T & L Personnel Services, Inc. appears to be the successor to Tahn V. Lam Temporary Services.

2. "[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trail and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997).

3. Khan received workers' compensation benefits through T & L's workers' compensation insurance. However, those facts do not affect Accurate Mold's entitlement to statutory immunity. See Shaw v. Thrift Drug, Inc., Civ. No. 98-5170, 1999 WL 994020 at *4 (E.D. Pa. Nov. 2, 1999), citing Supp v. Erie Ins. Exch., 330 Pa. Super. 542, 550, 479 A.2d 1037, 1041 (1984).

4. At this time the business was known as Tahn V. Lam Temporary Services. T & L was incorporated in May 1997 and was the entity supplying Accurate Mold temporary workers on the day of the accident. Deposition of Tahn V. Lam (Lam dep.) at 26.

5. Under the T & L/Accurate Mold agreement, the workers were considered employees of T & L, and T & L "assume[d] all legal responsibility as the employer of such persons," which included workers' compensation insurance, employers'

liability insurance, and comprehensive general liability insurance coverage. Exh. A, attached to "Plaintiff's Response to Defendant's Motion for Summary Judgment."

6. Khan stated that he had no contact with any employee of Accurate Mold. 8/31 Khan dep. at 21.

7. A worker named Andres was the most fluent in English. Lam dep. 83.

8. These tasks included drilling holes, cutting plastic, sweeping, and loading and unloading materials on and from various machines.

9. When asked how he learned to do his job, Khan said, "[w]e used to do the work there by switching our works and doing it by rotation like some of us are making holes, some of us are doing other things with the machine, so we used to exchange and do it by rotation . . . and we used to watch each other how to do, so everything was full cooperation between my friends and I and it was easy." 8/31/99 Khan dep. at 10.

10. The power to assign particular tasks to "borrowed" workers does not by itself amount to a right to control. See Mature, 373 Pa. at 597, 97 A.2d at 62-63. However, as to unskilled jobs, unless retained by the lender or reposed in a third-party, the right to control ordinarily will lie with the borrower, even though the exercise of such control is not evident. In this instance, the lender did not retain a right to control the manner of performance and there was no third party.

UNREPORTED/NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1152

MOHAMMAD S. KHAN,

Appellant

v.

ACCURATE MOLD, INC.,

Defendant/Third-Party Plaintiff

v.

T&L PERSONNEL SERVICES, INC.;
TAHN V. LAM TEMPORARY SERVICES,
individually, jointly, severally and
in the alternative,

Third-Party Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Dist. Court No. 99-cv-00764)

District Court Judge: Hon. Edmund V. Ludwig

Argued on June 20, 2001

Before: ALITO, ROTH, and GARTH, Circuit Judges.

(Filed: July 31, 2001)

James R. Radmore (Argued)
Law Offices of James R. Radmore, P.C.
Two Penn Center, Suite 312
Philadelphia, PA 19102

JUDGMENT

This cause came to be heard on the record from the United States district Court for the Eastern District of Pennsylvania and was argued on June 20, 2001.

After careful review and consideration of all contentions raised by the appellant, it is hereby

ORDERED AND ADJUDGED by this court that Order of the District Court entered on January 18, 2000 is hereby AFFIRMED. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/

DATED: July 31, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1152

MOHAMMAD S. KHAN,

Appellant

v.

ACCURATE MOLD, INC.,

Defendant/Third-Party Plaintiff

v.

T&L PERSONNEL SERVICES, INC.;
TAHN V. LAM TEMPORARY SERVICES,
individually, jointly, severally and
in the alternative,

Third-Party Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Dist. Court No. 99-cv-00764)

District Court Judge: Hon. Edmund V. Ludwig

Argued on June 20, 2001

Before: ALITO, ROTH, and GARTH, Circuit Judges.

James R. Radmore (Argued)
Law Offices of James R.
Radmore, P.C.
Two Penn Center, Suite 312
Philadelphia, PA 19102

ATTORNEY FOR APPELLANT

George A. Prutting, Jr. (Argued)
Prutting & Lombardi
701 South White Horse Pike
Audubon, New Jersey 08106

ATTORNEY FOR APPELLEE

MEMORANDUM OPINION

ALITO, Circuit Judge:

Because the parties are familiar with the background of this appeal, it will not be set out. Mohammad Khan appeals the District Court's grant of summary judgment in favor of Accurate Mold, Inc. We affirm.

The sole issue in this appeal is whether, under Pennsylvania law, the evidence in the summary judgment record is sufficient to allow a reasonable jury to conclude that Accurate Mold was not Khan's employer. If Accurate Mold was Khan's employer, the exclusivity clause of Pennsylvania's Workers' Compensation Act, 77 Pa. Cons.

Stat. § 481, applies and prevents Khan's suit against Accurate Mold from proceeding. Although Pennsylvania's test for determining whether an employee provided by one party to another becomes an employee of the second party encompasses many relevant factors, see Accountemps v. Workmen's Comp. Appeal Bd., 548 A.2d 703, 704 (Pa. Commw. Ct. 1998) (listing seven factors), the sole determinative factor is which party had the right to control the employee "with regard not only to the work to be done but also to the manner of performing it." JFC Temps, Inc. V. Workmen's Comp. Appeal Bd., 545 Pa. 149, 153 (1996). Moreover, "[t]he entity possessing the right to control the manner of the performance of the servant's work is the employer, *irrespective of whether the control is actually exercised,*" Id. (Citing Mature v. Angelo, 373 Pa. 593, 596 (1953)). See Arthur Larson, 3 Larson's Workers' Compensation Law, §61.02 (2000) (Although many workers operate under the actual control of neither entity in a given case, the true issue is which entity (in any showdown, would have the ultimate right to dictate the method of work.").

We agree with the District Court's decision that, irrespective of who actually exercised control over Khan, no reasonable jury could conclude that Accurate Mold did not have the right to control Khan's work. See English v. Lehigh County Auth., 428 A.2d 1343 (Pa. Super. Ct. 1981). We reach this conclusion for substantially the same reasons the District Court explained in its Memorandum Opinion. See Khan v. Accurate Mold, Inc., No. 99-764, at 2-6 (D. Pa. Jan. 18, 2000). We therefore affirm the decision of the District Court.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

BY THE COURT:

s/_____
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1152

MOHAMMAD S. KHAN,

Appellant

v.

ACCURATE MOLD, INC.,

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v.

T&L PERSONNEL SERVICES, INC.;
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individually, jointly, severally and
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SUR PETITION FOR REHEARING

Present: ALITO, ROTH, and GARTH, Circuit Judges

The petition for panel rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petiion for panel rehearing is denied.

By the Court,

s/_____
Circuit Judge

Dated: September 17, 2001

Before: ALITO, ROTH, and GARTH, Circuit Judges.